IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.1105 OF 1987,
FIRST APPEAL NO.1106 OF 1987,
FIRST APPEAL NO.1107 OF 1987
AND
FIRST APPEAL NO.1108 OF 1987

Hindustan Organic Chemicals Ltd. ...Appellant
(in all the Appeals)

vs.

M/s.Vakharia Construction Co. ...Respondent
(in all the Appeals)

Mr.Vivek R. Walawalkar with Ms Priti Bokalkar & Jehzeel Master i/b M/s.Crawford Bayley & Co. for the Appellant
Mr.Kishor Jawle for the Respondent.

CORAM: A.S.OKA,J.
DATE : JANUARY 24,2007.

ORAL JUDGMENT:

1. The submissions of the learned Advocates for the parties were heard on day before yesterday. Today the Appeals are kept for dictation of the Judgment. Since the Appeals arise out of a common Judgment and Order, the same can be conveniently disposed of by a common Judgment.

2. The Appellant has taken exception to the Judgment and Order dated 30th September 1987 passed by the learned Civil Judge (Senior Division), Raigad at Alibag. The Appellant is a Government of India undertaking carrying on business of manufacturing chemicals. The Respondent is carrying on business of building construction. The dispute relates to the two contracts awarded by the Appellant to the respondent for

construction of buildings. The construction was of residential buildings for C.I.S.F. staff (Type A-5) and for school and H.O.C. staff (Type A-6) at Rasayani, Taluka Panvel District Raigad. The contracts were executed on 22nd December 1975. Clause 73 of both contracts reads thus :

73(a) Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to any other question, claims, right matter or thing whatsoever if any way concerning or relating to the contractor, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the work or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof, shall be referred for decision to :

(i) A sole Arbitrator who shall be appointed by the Managing Director of the Company in cases where the claim in question is below Rs.50,000/-.

(ii) A Sole Arbitrator to be mutually agreed upon between the contractor and the Company for all

claims of Rs.50,000/- and above provided always as follows : -

(a) In the event of the Contractor and the Company not being able to arrive at an agreement as to the appointment of a Sole Arbitrator for the purpose of sub-clause (a) (ii) above, the matter on which arbitration is sought shall be referred for decision to two Arbitrators, one of whom shall be appointed by the contractor and the other by the company. The Arbitrators so appointed shall be Engineers of standing and experience and before entering into reference, the two Arbitrators shall nominate an umpire to whom the case will be referred in the event of any difference of opinion between the two Arbitrators. The decision of the Umpire shall, in that event, be final and binding on the parties.

(b) The venue of arbitration shall be the place as the Management at its sole discretion may determine.

(c) Upon every and any such reference assessment

of the costs incidental to the reference and award respectively shall be in the discretion of the Arbitrator.

. Subject as aforesaid, the provision of the Arbitration Act,1940, or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to arbitration proceedings under this clause.

(d) If within 30 days of receiving intimation from the Company that the final bill is ready for payment, the contractor does not raise a dispute and ask for reference of the same to arbitration under this clause, all the contractor's right under this contract shall be deemed to have been forfeited and his claim extinguished."

3. It appears that the Appellant by a letter dated 3rd February 1978 had invoked two bank guarantees given by the Respondent. The Respondent raised claims against the appellant by a letter dated 8th February 1978 and invoked clause 73 of the General Conditions of the contract. By the aforesaid letter, the Respondents communicated to the

Appellant that they have appointed one Shri G.S.Pandor as an Arbitrator on their behalf. By the said letter, the Appellant was called upon either to appoint Shri Pandor as the sole Arbitrator or to nominate its own arbitrator. On 3rd May 1978, the Appellant appointed one Shri N.N.Shrikhande as an Arbitrator and issued a communication to the Respondent accordingly. It is contended that Shri G.S.Pandor and Shri Shrikhande on 3rd January 1979 appointed one Shri D.G. Divgi as the Umpire. On 5th November 1979, the Respondents purportedly appointed Shri R.A.Gheewala as their Arbitrator in place of G.N.Pandor who had expired. On 3rd May 1980, the Arbitrators Shri Gheewala and Shri Shrikhande issued notice fixing a meeting on 8th July 1980. The Arbitrators appointed one Shri Jamshed Aga as an Umpire. In the meanwhile, the Appellant filed Miscellaneous Application No.18 of 1980 before the learned trial Judge seeking a direction that the arbitration proceeding between the parties be determined. On 13th July 1981, the Respondents wrote a letter to the Arbitrators contending that they allowed their time to expire and therefore they were invoking the Umpire to enter on reference. On 29th August 1981, the Appellant’s Advocate made a representation before the Umpire not to proceed with the Arbitration Proceedings as Application No.18 of 1980 was pending before the Civil Court. On 12th October 1981 an Award was made by the Umpire.

4. Special Civil Suit No.30 of 1981 arises out of the filing of the Award by the Umpire under sub section 2 of section 14 of the Arbitration Act, 1940 (hereinafter referred to as the said Act of 1940). By the impugned Judgment, a decree has been passed in terms of the Award dated 12th October 1981 made by the Umpire.

5. Misc. Application No. 24 of 1981 was filed by the Respondents before the Trial Court seeking Judgment in terms of Award made by the Umpire. The said Application has been allowed by the Impugned Judgment and Order.

6. The Appellant filed a Misc. Application No.4 of 1982 under section 30 of the said Act of 1940 for setting aside the Award. By the impugned Judgment and Order, the said Application has been rejected. Application No.18 of 1980 purportedly filed by the Appellant under section 33 of the said Act of 1940 has been also dismissed by the impugned Judgment and Award.

7. The learned Counsel for the Appellant submitted that the Respondents invoked arbitration clause even before final bills were prepared. He pointed out that the final bills were prepared on 14th March 1978 whereas arbitration clause was invoked by the Respondent on 8th February 1978. The second submission is that the alleged claim of the Respondents arose

out of two distinct contracts and therefore their could not have been a common reference and consequently a common Award. He submitted that the Arbitrators appointed viz.G.S.Pandor and Mr.Shrikhande did not conclude arbitration proceedings within a period of four months from 3rd January 1979 i.e. the date on which they entered upon the reference. He submitted that therefore the appointment of Mr.Gheewala made on 5th November 1979 as an arbitrator was invalid. He submitted that an appointment of Shri Aga as an Umpire is illegal and invalid as the appointment of Shri Gheewala was itself illegal. Even assuming that the appointment of Shri Gheewala was valid, he submitted that the date on which Shri Gheewala and Shri Shrikhande purportedly appointed Shri Aga as an Umpire, they were functus officio. He submitted that in any event, once Shri Divgi was appointed as an Umpire, there was no occasion to appoint Shri Aga as an Umpire. Shri Divgi was already appointed as an Umpire and there was nothing on record to show that Shri Divgi neglected or refused to act upon reference or was incapable of acting or had died. He submitted that even assuming that the appointment of Shri Aga was validly made, he could not have entered upon the reference as there was no dispute between the two arbitrators. He, therefore, submitted that the action of Shri Aga of entering upon the reference was contrary to section 3 of the said Act of 1940 read with paragraph Nos.3 and 4 of the first Schedule under the said Act of 1940. The learned Counsel for the Appellant placed

reliance on the decision of the Apex Court in case of Ethiopian Airlines Vs. Stic Travels (P) Ltd. [(2001) 7 S.C.C. page 454). He submitted that Umpire who was originally appointed continued in the same capacity even if either of the joint arbitrators was replaced. He submitted that there was non application of mind on the part of the Umpire as he has failed to record reasons.

8. The learned Counsel for the respondents supported the impugned Judgment and Order. He invited my attention to the findings recorded by the Trial Court on various aspects. He placed reliance on the decision of the Apex Court in case of Nagarpalika, Mirzapur Vs. Mirzapur Electricity Supply Co.Ltd. (A.I.R. 1990 S.C. page 2273). He also pressed into service another decision of the Apex Court in case of Keshavsinh Vs. Indian Engineering Co. (A.I.R. 1972 S.C. page 1538). Lastly, he relied upon the decision of a Division Bench of this Court in case of M/s.Jolly Steel Industries Pvt.Ltd. Vs. Union of India and another (A.I.R. 1979 Bombay page 214). He submitted that no interference is called for.

9. I have carefully considered the submissions made on behalf of the parties. For the purpose of dealing with the first submission made by the learned Counsel for Appellant, it will be necessary to refer to clause 73 of the general conditions of the contract. If clause 73 is perused, it is apparent that

the said clause applies to any question, claim, right whether arising during the progress of work or after completion or abandonment thereof. Therefore, on plain reading of the said clause, I am of the view that there is no merit in the said submission that the arbitration clause could not have been invoked before the preparation of the final bills. It appears that in February 1978 itself, the Appellant had contended that the bank guarantees were required to be invoked as the work was not properly carried out by the Respondents. That was the starting point of the dispute between the parties. Therefore, there is no merit in the first submission of the learned Counsel for the Appellant.

10. The second submission which is canvassed is that for the two distinct contracts, there could not have been a common reference and a common Award. It will be necessary to refer to the correspondence between the parties which is placed on record. There were two separate contracts regarding construction of the buildings. One was as regards residential quarters for C.I.S.F. staff (Type A-5 Buildings) and the other was in respect of building for school and H.O.C. staff (Type A-6 Buildings). It is pertinent to note that the claim which was raised by the Respondents by a letter dated 8th February 1978 was as regards both the contracts. It will be necessary to refer to the telegram sent by the Appellant on 29th April 1980. By the said telegram the Appellant called

upon the Respondents to provide terms of the reference to be referred to the Arbitrator and informed that the name of the Arbitrator appointed by the Appellant will be shortly communicated. A letter of confirmation sent by the Appellant to the Respondents refers to the construction of both types of the buildings by the Respondent. Thus, it is apparent that when the Appellant appointed Shri N.N.Shrikhande as an Arbitrator, the Appellant appointed him as an Arbitrator in respect of the alleged dispute as regards both the contracts. The learned Trial Judge while dealing with this aspect of the matter has dealt with the aforesaid factual aspects of the case. If the correspondence between the parties is perused, there appears to be a clear intention on the part of both the parties to appoint the same arbitrators for the dispute pertaining to both the contracts. The appellant has not raised any objection in that behalf any time earlier in the correspondence. Therefore, there is no error in the view taken by the trial court so far as this contention is concerned.

11. The third contention is that on 5th November 1979, Shri R.N.Gheewala could not have been appointed. The contention which is raised is that joint arbitrators entered the reference on 3rd January 1979 and the proceeding came to an end on expiry of a period of four months from the date of entering the reference. It is submitted that the time was not

extended by the court. The decision of a Division Bench of this Court in case of Jolly (supra) is relevant on this aspect. The Division Bench held that the arbitration proceeding consists of two stages. The first stage consists of merely ministerial acts while the second stage consists of effective adjudicative acts in furtherance of the work of arbitration. The Division Bench also held that the Arbitrator cannot be said to have entered on the reference unless the second stage can be said to have been reached. The Division Bench held that the action of the Arbitrator of issuing notice does not fall in the second stage. The Division Bench observed that issuing notice, accepting the statement of the claimants and granting adjournments is part of the earlier stages of the arbitration proceeding. Therefore, the argument that the arbitrators entered on the reference on 3rd January 1979 is without any merit. The learned Trial Judge has dealt with this aspect. There is nothing on record to show that the Arbitrators entered the second stage as contemplated by the decision of the Division Bench of this Court. The submission as regards the illegality of the appointment of Shri Aga is on the basis that the appointment of Shri Gheewala was invalid. The appointment of Shri Gheewala cannot be said to be invalid in view of what is stated above. Therefore, the appointment of Shri Aga cannot become illegal on this ground.

12. Reliance is placed on the implied conditions of the

arbitration agreements.The first schedule of the said Act of 1940 provides for implied conditions of arbitration agreements. In the first schedule of the said Act of 1940, relevant conditions are condition Nos.2 to 4. Reliance is placed on sub clause (ii) (a) of Clause 73 of the general conditions of the contract. It is submitted that the Umpire Shri Aga could have entered on the reference only if there was a difference of opinion between the two arbitrators. It is submitted that the arbitrators could have appointed the Umpire only in the contingency contemplated by the said clause. However, clause 73 provides that the provisions of the Arbitration Act, 1940 or any other statutory modification or re-enactment thereof and the rules made thereunder shall apply to the Arbitration proceedings under this clause. Therefore, condition 4 of the implied conditions of the arbitration agreement in the first schedule will certainly apply to the arbitration proceeding under clause 73. Therefore, in view of the said clause No.4 of the first schedule to the said Act of 1940, the Umpire could have entered on the reference as the Arbitrators allowed their time to expire without making an Award.

13. Reliance has been placed by the learned Counsel for the Appellant on the decision of the case of Ethioplan Airlines (supra). The Apex Court was dealing in the case before it the applicability of sub section 2 of section 10 of the said Act

of 1940. Paragraph 29 of the said decision reads thus :

"29. In view of the aforesaid finding, the ancillary question raised through the letter dated 28-12-1998 by the counsel for the appellant, regarding appointment of a fresh Chairman after the appointment of a fresh Chairman after the appointment of Mr.Justice H.L.Anand has no merit for acceptance. If the Tribunal consisted of three Members, as we have interpreted it so as to fall under subsection (2) of Section 10, then even if one of the arbitrators nominated by the party is incapacitated or dies and is later substituted, it would not give fresh right to such two arbitrators appointed by the parties, to appoint a fresh Chairman. Appointed Chairman by the said two arbitrators does not fall because of the substitution of one of the nominated arbitrators on account of death or incapacitation of one of the such nominated arbitrators. We may record here, Justice H.L.Anand's opinion about the validity of the Arbitral Tribunal consisting of three Members, in view of Section 10(1), did require consideration. However, in view of the findings recorded by us, this controversy stands settled."

14. The Apex Court was dealing with a case where the dispute

was as regards an appointment of the Chairman of the Arbitral Tribunal where the Tribunal was to consist of three Arbitrators. In the case in hands the dispute is as regards an appointment of the Umpire. In the case in hand it is not in dispute that Shri G.S.Pandor expired before the joint Arbitrators entered on the reference. As a result of change in constitution of the Tribunal, joint Arbitrators Shri Gheewala and Shri Shrikhande appointed another Umpire Shri Aga. Thus, the decision of the Apex court will not help the Appellant. It is difficult to accept the submission made by the learned Counsel for the Appellant that Shri Aga could have been appointed only in the event of a dispute between the arbitrators.

15. So far as the last submission of non application of mind by the learned Umpire and failure to record reasons is concerned, it is necessary to refer to the view taken by the learned Trial Judge. It must be noted that though Application No.18 of 1980 was filed by the Appellant, admittedly no interim relief was granted of intervention in the arbitration proceeding. There is nothing on record to show that any sufficient cause had prevented the Appellant from appearing before the learned Umpire. In the present case, there appears to be a deliberate refusal on the part of the Appellant to appear before the Umpire. The Appellant had chosen not to appear before the Umpire and not to contest the proceeding.

That is the reason why the Umpire accepted the documentary evidence led by the Appellant as valid. In this view of the matter, the last contention raised by the learned Counsel for the Appellant cannot be accepted.

16. There is no error in the view taken by the learned Trial Judge in the impugned Judgment and Order and there is no merit in the Appeals. Hence, Appeals are dismissed with no order as to costs.

17. As a result of dismissal of the Appeals, interim order passed in Civil Application No.6656 of 1987 will have to be vacated. The Respondents have withdrawn a sum of Rs.12,00,000/- on furnishing bank guarantee in terms of the interim order passed by this Court. The said bank guarantee will stand cancelled after a period of three months from today.

18. The Respondents will be entitled to withdraw a sum of Rs.3,90,325.75 invested in the fixed deposit together with interest accrued thereon. Office will permit the withdrawal only on expiry of period of three months from today.

JUDGE